

MINUTES

MONTANA HOUSE OF REPRESENTATIVES 58th LEGISLATURE - REGULAR SESSION

COMMITTEE ON LOCAL GOVERNMENT

Call to Order: By **CHAIRMAN MARK NOENNIG**, on January 9, 2003 at 3:30 P.M., in Room 472 Capitol.

ROLL CALL

Members Present:

Rep. Mark Noennig, Chairman (R)
Rep. Eileen J. Carney, Vice Chairman (D)
Rep. Scott Mendenhall, Vice Chairman (R)
Rep. Arlene Becker (D)
Rep. Rod Bitney (R)
Rep. Larry Cyr (D)
Rep. Ronald Devlin (R)
Rep. Gary Forrester (D)
Rep. Ray Hawk (R)
Rep. Hal Jacobson (D)
Rep. Jesse Laslovich (D)
Rep. Bob Lawson (R)
Rep. Rick Maedje (R)
Rep. Penny Morgan (R)
Rep. Alan Olson (R)
Rep. Holly Raser (D)

Members Excused: None.

Members Absent: None.

Staff Present: Connie Erickson, Legislative Branch
Linda Keim, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed. The time stamp for these minutes appears at the beginning of the content it refers to.

Committee Business Summary:

Hearing(s) & Date(s) Posted: HB132, HB 147, 1/6/2003
Executive Action: None

{Tape: 1; Side: A; Approx. Time Counter: 0 - 3.2}

HEARING ON HB 147

Sponsor: REPRESENTATIVE BOB LAWSON, HD 80, WHITEFISH

Opening Statement by Sponsor:

REP. BOB LAWSON, HD 80, WHITEFISH said he is carrying this bill to help cities do a better job managing their scarce resources by allowing fee structures and projected fees to be used under certain conditions in selecting architectural, engineering, and land surveying services. New language in this bill is found on page two, section (d), lines 2-5.

Proponents' Testimony:

{Tape: 1; Side: A; Approx. Time Counter: 4.4 - 9.8}

Gary Marks, City Manager, City of Whitefish, presented written testimony, which he read. He stated that the City of Columbia Falls also supported this bill.

EXHIBIT(loh04a01)

{Tape: 1; Side: A; Approx. Time Counter: 10 - 18.6}

Doug Adams, Whitefish City Council said that one of his duties on the Council is to approve contracts. Mr. Adams also presented written testimony, which he read.

EXHIBIT(loh04a02)

{Tape: 1; Side: A; Approx. Time Counter: 18.7 - 21.1}

Erik Garber, Civil Engineer, Whitefish, said they are asking for the opportunity to better define the consultants they hire and make a decision based on the best interest of public health, welfare and safety. The quality of work should not be negotiated by price. Private clients cannot be served any differently than municipal or federal clients. He said he has an obligation to serve his clients with integrity, regardless of the discussion of price. Many other businesses would love the opportunity to shield themselves from the liability of discussing and committing to a price before work begins. Price will merely provide another tool to help city and state governments evaluate the abilities of the consultants they hire. Amending and removing the discussion of cost artificially inflates the cost of engineering services. Free market concepts dictate that free market competition will provide a better product and a better price.

Opponents' Testimony:

{Tape: 1; Side: B; Approx. Time Counter: 0.00 - 8.4}

Jay Skoog, Executive Director American Council of Engineering Companies of Montana, which represents consulting engineering firms throughout Montana read his written testimony.

EXHIBIT (loh04a03)

{Tape: 1; Side: B; Approx. Time Counter: 8.6 - 15.4}

Jim Weatherly, representing himself, a professional Engineer in private practice in Montana for 32 years, gave the history of the current law. It was enacted with careful consideration and is based on the Qualification Based Selection (QBS) method which the Federal Government adopted for selection of professionals in 1972 and still uses. This process first identifies the most highly qualified firm or individual, then negotiation of price is begun. If no agreement is reached, you go to the second firm, etc.

In the 1980's, the American Bar Association initiated a study about how state and local governments should procure goods and services and produced a manual called the **Model Procurement Code for State and Local Agencies**. It indicated the QBS method was preferred, because of the importance of selecting the best qualified firm to represent the interests of the owner.

Also in the 1980's, the State of Montana started to get unrealistic price requests for proposed projects, such as a three ring binder with 200 pages of detail. In other instances, they received a one-page letter with only one paragraph requesting full development and cost. Huge amounts of staff time in the State Department were wasted trying to find something they could price. In 1983, Governor Schwinden's staff did a nation-wide study to find a preferred method for Montana. They came up with the QBS method, and a directive was issued to use it. The current law was passed in 1987.

All in-depth studies on selection of design professionals indicate that more problems occur when price is used in the initial selection process. Design fees are often less than 1% of the total life cycle costs of a project, but skimping on the original design will show up for the life of the project. Professional liability insurance requires reporting how many dollars in fees were generated from low bid or price competition and how many dollars were generated from QBS. Rates will go up, depending on how many dollars were based on price selection. Insurance companies know where the risk is, where the problems

occur on projects. It is human nature when you have a price in front of you to want to go with that low price.

The current law is very similar to the Federal law. It is what has been used by the state agencies, city, county governments and is familiar to all. The process works and has been proven to be better than selection based on lowest price.

{Tape: 1; Side: B; Approx. Time Counter: 15.6 - 30.0}

Karen Fagg, HKM Engineering Inc., which is a professional engineering firm with offices in Butte, Bozeman, Billings, Miles City, Montana, and Sheridan, Wyoming. The common theme between both proponents and opponents is to save money for the taxpayer. To pass this bill based on saving money would be giving the taxpayer a false sense of cost-effectiveness. The process is detailed. Look at the small communities in Montana who will be hurt. They are being asked to go to a higher level in developing the scope of work. The process takes a lot of effort by people that don't feel qualified to select based upon qualifications. This indicates they do feel qualified to select based upon low cost, the worst criteria for selection of a professional. In private work, selection is rarely made based on low cost. The engineer is either going to over design drastically because professional liability is involved, and construction costs go up. Or, they will under design, thereby putting all the risk on the contractor. One example is a request for a simple waterline replacement from point A to point B with the requestor not knowing what the soil conditions are, and/or type of utilities that might be encountered. Obviously the costs will vary considerably from location to location. Negotiation is a necessary part of the process, because the lowest bid is not always the best one. For this reason, we oppose HB 147.

{Tape: 2; Side: A; Approx. Time Counter: 0.5 - 7.9}

Rodger Foster, a professional Engineer employed by Morrison, Maierle Engineers presented written testimony, which he read.
EXHIBIT(loh04a04)

{Tape: 2; Side: A; Approx. Time Counter: 8 - 8.3}

Jim Kembel, Montana Association Registered Land Surveyors, said they support the comments of the opponents.

{Tape: 2; Side: A; Approx. Time Counter: 8.4 - 10.6}

James Brown, C.W.G. Architects, Helena, in practice 33 years said he would address two projects that he had been involved in.

One was based on price selection, and one was based on QBS. The QBS project was a University of Montana project and the scope of work was very well defined. It could have been considered for price based selection. After the architect was selected based on QBS, and after already developing a scope of work, he received information that the project had changed dramatically in scope. They dropped one of the buildings and completely modified the site development. This is common in architectural projects. Trying to come up with a scope of work that a design professional can give a price on before getting into the project is a difficult process.

The second project had price as a criteria. This was Canyon Village in Yellowstone National Park for Zantara Corporation, and they asked for price. In discussing the project with Zantara staff after they selected the professional, it turned out that the prices had been scattered so widely across the scope of the project that they could not compare apples to apples. They ended up throwing price consideration out and going back to QBS.

{Tape: 2; Side: A; Approx. Time Counter: 10.8 - 13.7}

Informational Witnesses:

Jim Currie, Deputy Director Montana Department of Transportation said they are not taking a position either way but wanted to explain how they operate with regard to consultants.

(1) About \$25 million worth of work is done every year with the consultant industry to design half their highway construction projects. They approach this in two separate ways because of the volume of contracts they have, and they go through a prequalification process so they have a list of qualified consultants to choose from. On some projects, they put out a Request for Qualifications (RFQ). Either way, a committee looks at the project and the qualifications. They come up with a short list of consultants they feel would be right for this project. Then their consultant engineer meets with the first firm on that list and together they develop a more detailed scope of the project. After the detailed scope has been developed, they negotiate price. They are not held hostage by price, because if they can't come to agreement with the consultant, they can always go to the next consultant on the list.

(2) The second item of information is that Department of Transportation staff did research to determine federal requirements. They found that when federal highway funds are used, there is a requirement with the Federal Highway Administration to follow procedures that do not allow for the use of price as a factor in the selection process; i.e., QBS has been

adopted. The way this bill has been written is not problematic because it is permissive. It says an agency "may" adopt, and as long as it remains that way, they would continue to operate like they currently do, to make sure they stay in compliance with federal requirements. If this bill got amended to "require" the use of price, they would have a problem in regard to the use of federal highway funds.

{Tape: 2; Side: A; Approx. Time Counter: 14 - 19.8}

Questions from Committee Members and Responses:

REP. LASLOVICH asked if there is a specific instance in the City of Whitefish that prompted the drafting of this bill. **Doug Adams** replied that part of his duty on the city council is to approve contracts. They are not allowed to talk price, they never said they only wanted to do it on price and none of them said they would take low bid. Odds are they would never take a low bid. The issue is they would like the opportunity to consider that so they know what they are talking about.

REP. LASLOVICH asked if the Whitefish City Council approves contracts by sitting down with the most qualified group and negotiating price like **Jim Currie** just said. **Doug Adams** said that is the procedure used, but it is cumbersome, because if an agreement is not reached, the process must start over again. If it is a time critical issue, you may not get it done in a short construction season due to a harsh winter. It would be faster if done concurrently. Price is not the issue, quality is.

REP. LASLOVICH asked if it is infeasible for an agency to develop a detailed scope and submit that to the consultants just like a construction company would provide prices for that scope. **Karen Fagg** replied that it is not infeasible, but that it is very difficult just to put together the steps we already have. To develop a detailed scope on a water treatment upgrade would require a water treatment engineer on staff that had designed other water treatment plants to know what kinds of upgrades you want and how you want it designed. That puts a bigger burden on the smaller communities like Anaconda, that don't have all the resource experts on staff. One engineer might have to be hired to develop a detailed scope of work and another engineer hired to actually do the design. It would add more time in developing that scope of work, rather than selecting an engineer, sitting down and negotiating that full scope of work with the cost. Cost is important, but it also comes down to preferences.

REP. LASLOVICH asked how long the average negotiating process is. **Karen Fagg** answered that it depends upon how complicated the

project is. It can be put together fairly quickly in a face to face discussion with the Montana Department of Transportation or a community talking about geo-technical information, the design, what the community wants to accomplish by this upgrade, and the life cycle costs. Other questions include whether a trained operator is available to operate the facility, whether the automated system is needed, and if it can be paid for up front. It does come down to cost, because an automated system increases the design cost.

{Tape: 2; Side: B; Approx. Time Counter: 0.00 - 19.7}

REP. JACOBSON asked how a parallel bid analysis is made. **Erik Garber** replied that the bid documents may be as many as hundreds of design drawings and thousands of pages of specs. The important issue is for everyone to be on the same playing field. All the contractors have the same set of specs and the same set of drawings. When they receive the RFP (Request for Proposal) on a specific project, or RFQ (Request for Qualifications) on a certain type of project such as water improvement; all of the contractors have the same opportunity to interview city staff, or to go to the site and look at it. Engineering is not a cut and dried profession, but they are playing from the same play book as the contractors do when they bid it.

REP. JACOBSON asked if the RFP would be the same exact bid document as the contractor's. **Erik Garber** said no, they are not that large, but they are the municipalities best guess at what they need. He is not asking that cities be allowed to use cost as their criteria, but as a means of evaluation. If an engineer comes in and says this is going to cost \$1,000, and three other engineers have estimates of \$19,000, \$17,000, and \$15,500, this may indicate that the first engineer doesn't know what he is talking about. Everyone would like the opportunity to go and develop a scope outlining what will be done and how much it will cost, and at the end know they got a good deal.

REP. BITNEY asked for a short example of the type of problem being dealt with. **Erik Garber** explained they are talking about the process by which a government agency selects its consultants. The issue here is whether it is beneficial to have cost as part of that decision making. This bill would bring in another tool to allow evaluation of the qualifications.

REP. BITNEY asked for a specific example as to why Whitefish is in favor of the change. **Erik Garber** said it could be any project, but most recently they had a sewer design project where they hired someone to revamp the waste water treatment system. They were very qualified and did the job, but by the end of the

job, it was well over Mr. Garber's estimate. If they would have had an estimate that said "somewhere in the neighborhood of", they would have known if they were being fleeced or not.

REP. BITNEY asked why they are opposed to the change in the permissive language. **Jay Skoog** said QBS is a time proven method of procuring these services that results in a lower total life cycle cost when the correct professional is selected based on the most qualified firm. To introduce price into the mix is automatically going to place a lot of emphasis on price. To say that when you get a list of prices on what they term a well defined scope, that you somehow will be able to compare those prices and save taxpayer money over the total 30-40 year life cycle of that project is not realistic. When a firm is selected using QBS, negotiate a price and define the scope well, and they produce the best set of plans possible, the total cost of the design will be substantially less, as shown in the graph in Rodger Foster's testimony, Exhibit 4.

REP. MENDENHALL asked how many firms American Council of Engineering Companies of Montana (ACEC) represented. **Jay Skoog** replied that he represented 40 and there are about 80 in Montana. Most of the larger firms belong to ACEC, but they have all sizes represented.

REP. MENDENHALL asked if it was known how much insurance rates would increase. **Jay Skoog** said cost is not known, but their firms are rated upon by their insurance carriers.

REP. MENDENHALL asked if QBS has ever turned out to be a barrier for new entrance into the market, not necessarily better engineering. **Jay Skoog** said he has not heard anything to confirm that. Every year in Montana new firms enter the market and experienced staff leave their firms and start new firms. It is a highly competitive market, and there are always lots of firms putting in proposals on projects.

REP. MENDENHALL asked if this is a prevailing issue with the League of Cities or Montana Association of Counties (MACO), or if they have a position. **Gary Marks** said that in fact, Alec Hanson, Director of the League of Cities did intend to speak in support of this today, but was called away.

REP. CARNEY asked for an explanation of why the insurance would go up if the price base was used. **Jim Weatherly** explained that renewing their insurance each year requires answering a 4-6 page questionnaire. Specific information is asked regarding risk. They don't break it down as to cost. He is getting quotes now, and his professional liability insurance is more than twice what

it was last year. It has nothing to do with low bid, because they don't bid on projects. They do mostly private work, 60% private, 40% government. Private work developing what the client wants is done by the hour. They do nothing that is based on price, and their insurance rates still go up. Insurance companies ask their clients 6-8 key questions that reflect rates.

REP. CARNEY asked why price based would be more of a risk. **Jim Weatherly** said it has been proven in studies, and insurance companies know they have more problems in those projects where the design professional is selected on the basis of cost. It stands to reason, to get your costs down, you have to spend less time on the project and it is more prone to error and change orders during construction. That is why the American Bar Association recommended the model procurement code they did.

REP. MAEDJE asked what the problem would be in communicating your hourly rate before you are chosen. **Jim Weatherly** said that once you start disclosing prices, human nature becomes the overriding factor. Several public works directors were asked about this bill and they said they would not take a position. Since this bill says "may" they don't care. If cities want to use price it is okay, but the public works directors won't. It will make their job more difficult because they have to explain to the politicians why they don't go with the lowest bid. They have to make the same argument we do; because it is proven to not generate the same quality of product as when price is used in the selection.

CHAIRMAN NOENNIG said he could not find the requirement about price not being considered. He asked where that restriction was found in the statute and if there is anything in the current state statute that precludes price being included by an agency. **Jay Skoog** said this is an attorney general's opinion, written by Marc Racicot in 1992. In his opinion, price cannot be a factor in the selection of these consultants.

EXHIBIT (loh04a05)

{Tape: 2; Side: B; Approx. Time Counter: 19.7 - 20.8}

Closing by Sponsor:

REP. LAWSON referred to Exhibit 5 and said that part of the ruling says "it is notable that nowhere in this section is a proposed fee listed as a criteria for the most qualified firm". What they are trying to do in this bill is address the attorney general's ruling and put in that criteria. One of the compelling reasons to support HB 147 is that this is another optional tool in government's endeavor to maximize their scarce resources. He

said he believed in allowing government to operate in a more businesslike manner and make decisions based upon the best possible information. He emphasized: "This does not dictate using low bid, only the possibility of considering cost factors. Qualifications remain very critical, we just want the ability to consider all and other criteria." He said, "Let's level the field and make the boundaries for government and private business the same. Local government is looking for options; stress on local control, stress on the ability to look at all options as early as possible."

{Tape: 3; Side: A; Approx. Time Counter: 0 - 0.5}

HEARING ON HB 132

Sponsor: REPRESENTATIVE JOHN MUSGROVE, HD 91, HAVRE

Opening Statement by Sponsor:

REP. JOHN MUSGROVE, HD 91, HAVRE said that HB 132 is an act revising laws relating to municipal classification. At the last U.S. Census, Havre found itself in a unique position. The reported figures showed 9,643 people, some 250 short of Class I designation. He felt they were undercounted by this census, but regardless of the count, Havre wanted to maintain Class I status.

Proponents' Testimony:

Bob Rice, Mayor of Havre said the census shows only a few hundred people short. This was put on the books in about 1894, and it is the first time it has come into play. He has received many calls from both parties on this subject, and the community is unified in supporting it. After repeatedly trying to get information from the Census Bureau in Denver, they took a solicited census on their own. They solicited 100 residents, and since only 11 had been polled by the Census Bureau, they felt they were short changed on their population. The reason for the bill is to reclassify Havre and eliminate the annual election. According to the code, they would have to conduct an annual election this year. The County Clerk said it would cost over \$7,000 to have another election and they don't have the money. It would be primarily a city election, and all the city elected officials would have to run for office again. The options were to have another election, table this, or try to get this bill approved by the legislature.

Alec Hansen, League of Cities and Towns said their organization supports this bill. Havre shows a population of 9,621 people. Several articles in the paper this fall indicated that Hill

County may have been under counted in the census. If they were undercounted by slightly more than 3%, the city of Havre would have a population of 10,000. A year ago at the regular election, Mayor Rice ran for a four-year term. Now that the city is going to be reclassified, apparently his term is cut in half and he may have to run again. This bill only affects Havre, but it is not special legislation, because it does not mention Havre.

There are three second-class cities in Montana; Lewistown has a population of 5,813 and Livingston has 6,851, Miles City has 8,467. This bill is not without precedent, as there are other exemptions to the classification system. If the numbers are questionable and the difference is 300 people, Havre should be able to decide for itself whether it wants to be a first- or a second-class city. There are exemptions for towns and third-class cities. An exemption was created for Glendive to allow them to have a paid fire department, although they had lost population and were forced to become a third-class city. This is something that makes sense; it is logical and fair. The people here supporting the bill are the only ones it affects.

Doug Kaercher, Hill County Commissioner said he supports the bill because it is beneficial to Hill County. Having served five years on the Havre City Council, he feels it is also a benefit to the city and all cities that fall under this law. It is economically important to Havre and any city that has the responsibility of being a regional hub.

REPRESENTATIVE BOB BERGREN, HD 90, HAVRE said he wants to see the best for his area and it does have some ramifications for the fire department. He liked the fact that the options are there for the city to decide for themselves and said he supports this.

Opponents' Testimony: None

Informational Testimony: None

{Tape: 3; Side: A; Approx. Time Counter: 10.4 - 22}

Questions from Committee Members and Responses:

REP. OLSON asked if there needed to be an immediate effective date on this bill in order to postpone having a municipal election this fall. **REP. MUSGROVE** deferred to **Legislative Staffer Connie Erickson**. **REP. OLSON** said if this would take effect 10/1/2003, that elections have to be noticed considerably sooner, and it could save the City of Havre some money. **REP. MUSGROVE** said he would consider that a friendly amendment. **REP.**

OLSON will bring that forth during Executive Session and Ms. Erickson will check it out before then.

REP. MORGAN asked for clarification about the frequency of elections between classes. **Bob Rice** said this would be a one time thing. An annual election is required every time census numbers drop or go forward

REP. CARNEY asked what other differences it would make. **Bob Rice** said a Class II city has the option of having a volunteer fire department with a supported paid fire department. They could have 16 volunteers with one paid fire chief. The problem with having a volunteer fire department is that the insurance rates on people's homes go up because it is volunteer. That is one of the things that brought up this issue.

REP. DEVLIN asked if this is similar to county classifications where it affected pay scales, whether they are full time or part time. **Mr. Rice** said the only thing it affected is their fire department.

REP. JACOBSON asked how other cities and municipalities are designated in the code. **Alec Hansen** replied that up until now, first-class is everything over 10,000, second-class is everything between 5,000 and 10,000 with the option of going up to 7,500 without becoming second-class. Third-class cities are 1,000 to 5,000, and towns are under 1,000. There is an exemption that allows a choice between remaining a town or becoming a city. There isn't a lot of difference. The difference between a first-class city and a second-class city is the volunteer fire department. The difference between a second-class city and a third-class city is that a third-class city cannot have a paid fire department. In towns and some third-class cities there is some difference in overtime pay for police officers.

CHAIRMAN NOENNIG said he did not understand the election process. **REP. MUSGROVE** said if a city goes up or down in classification, they are required to form a new City Charter. That is what makes the election process come into play.

CHAIRMAN NOENNIG asked if this reduction in class size had happened before. **Alec Hansen** said it had not happened in a long time. **CHAIRMAN NOENNIG** asked for clarification; that if that was the issue, a city should be able to opt out if their population is going down. **Alec Hansen** said it does not apply just to Havre. The way the bill is written is that if you are above 10,000, then after reclassification at the next election everyone has to be re-elected. **CHAIRMAN NOENNIG** said perhaps the solution to the problem might be that if the census moved you down a class, there

would be the option to keep it. Then they wouldn't have to get into all these numbers, or just single out Havre. **REP. MUSGROVE** explained that they are changing the figure from an arbitrary 10,000 and broadening that out to allow a choice between 9,000 and 10,000. It would affect anyone within the range of that population, not just Havre.

Closing by Sponsor:

REP. MUSGROVE said he appreciated the questions, and while it does appear to be just a Havre bill, it affects them only at this particular time in their population change, and means a lot to the people of Havre. In looking through the law books, there are some very archaic sections of the municipal code under Chapter VII. It would behoove us to put forth a resolution for an in-term study for this committee to look through that code, or perhaps the committee itself would choose to do so. He ended by asking for support of HB 143.

ADJOURNMENT

Adjournment: 5:10 P.M.

REP. MARK NOENNIG, Chairman

LINDA KEIM, Secretary

MN/LK

EXHIBIT (loh04aad)